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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. YURI ALEX GABLER, Defendant and Appellant.	A154632 (Sonoma County Super. Ct. No. SCR708765-1)

Defendant Yuri Alex Gabler appeals from a final judgment and sentence entered after a plea of no contest. Defendant's appointed counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436, identifying no appellate issues and requesting this court review the record and determine whether any arguable issue exists on appeal. We conclude that defendant failed to preserve for appellate review his search and seizure challenge after failing to raise it in the superior court, and finding no other issues on appeal, we affirm.

BACKGROUND

Deputy Sheriff McBeth was on patrol in September 2017 when he conducted a traffic stop on the vehicle Gabler was driving. Among other things, McBeth had noticed Gabler's failure to come to a complete stop at a stop sign, a violation of Vehicle Code section 22450, subdivision (a). During the stop, McBeth asked Gabler if he was on probation, and Gabler said he was not. However, when McBeth contacted dispatch for a records check, he was told Gabler was on active probation, with a search and seizure

requirement, until 2020. After Gabler insisted he should not be subject to search because his probation had been terminated, McBeth ran a second records check—asking dispatch to make sure there was no mistake—which confirmed Gabler's probationary status. McBeth's probation search of Gabler's car disclosed an operable shotgun in the trunk, with a bag of shotgun shells beside it. After Gabler was placed under arrest and advised of his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436, he admitted he was holding the gun for someone else.

Gabler was charged with unlawful possession of a firearm in violation of a temporary restraining order, injunction, or protective order (Penal Code,[1] § 29825, subd. (a)) and unlawful possession of ammunition (§ 30305, subd. (a)).[2] He filed a motion to suppress the firearm and ammunition pursuant to section 1538.5, arguing the evidence was obtained through an unlawful, warrantless search of his vehicle. At a combined preliminary examination and hearing on the motion, McBeth testified that when he detained Gabler, he had no reason to believe the information provided by the dispatcher would be inaccurate or unreliable. He stated he was not aware at that time of any problems with the system. However, court records revealed Gabler's probation had, in fact, been terminated 10 days prior to the traffic stop at issue. At the conclusion of the hearing, the trial court held Gabler to answer on both counts and denied his motion to suppress.

On March 20, 2018, Gabler entered a negotiated plea of no contest on the two charges, with the understanding he would be placed on formal probation with credit for time served of 180 days in local custody and other standard probation terms.[3] As part of

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[1] All statutory references are to the Penal Code unless otherwise specified. All rule references are to the California Rules of Court.

[2] A third charge was dismissed at the prosecutor's request due to insufficient evidence.

[3] Gabler's maximum exposure for the two felonies was three years eight months.

the plea agreement, Gabler entered into a waiver in accordance with *People v. Cruz* (1988) 44 Cal.3d 1247, 1254, footnote 5 (*Cruz*), pursuant to which he was released from custody in exchange for a promise not to commit further crimes and to return for sentencing on May 10, 2018. Gabler, however, did not return for sentencing as required, having been taken into custody in Marin County in early May and subsequently convicted of misdemeanor driving under the influence and resisting arrest. As a result, his pretrial release was revoked. In light of his *Cruz* violation, Gabler was sentenced on June 7, 2018, to three years of formal probation, including one year in county jail, an increase from the previously negotiated 180 days. He received 236 days of credit from his sentence. Gabler filed a timely notice of appeal on June 11, 2018, based solely on the denial of his motion to suppress evidence pursuant to section 1538.5.

DISCUSSION

To appeal from a judgment of conviction predicated on a plea of guilty or nolo contedere, a defendant is generally required to obtain a certificate of probable cause from the trial court. (See *People v. Mendez* (1999) 19 Cal.4th 1084, 1088 (*Mendez*); § 1237.5; rule 8.308(a) [requiring the defendant within 60 days of the rendition of judgment to file a written statement with the trial court setting forth reasonable grounds for challenging the legality of the proceedings, including the validity of a plea, and obtaining a certificate of probable cause from the court as to those certified issues]; rule 8.304(b)(1).) Absent full compliance with the provisions of section 1237.5, an appeal is not operative and must be dismissed. (Rule 8.304(b)(3); *Mendez*, at p. 1098 [the requirement of obtaining a certificate of probable cause cannot be waived by the court].)[4]

[4] An appeal may be maintained on noncertificate grounds such as postplea matters not challenging the validity of the plea. (See § 1237.5; rule 8.304(b)(4)(B)). In his notice of appeal, Gabler did not mark any box indicating his intent to appeal on postplea grounds, but as discussed *post*, even so construed Gabler's appeal must be denied.

A statutory exception exists to the foregoing certificate of probable cause requirement: when a defendant challenges the reasonableness of a search or seizure in his criminal case, appellate review may be obtained so long as "at some stage of the proceedings prior to conviction he or she has moved for the return of property or the suppression of the evidence." (§ 1538.5, subd. (m); see rule 8.304(b)(4)(A).) This is so even when "the judgment of conviction is predicated upon a plea of guilty." (§ 1538.5, subd. (m).) Under this recognized exception, an appeal is operative and may be heard.

It is true that Gabler challenged the validity of evidence obtained by search and seizure "at some stage" prior to his conviction, namely, at the combined preliminary examination and hearing on his motion to suppress. But our analysis does not end there. Our high court has interpreted section 1538.5 to require the defendant to raise or renew a motion to suppress evidence *in the superior court* to preserve the point for review on appeal. (*People v. Lilienthal* (1978) 22 Cal.3d 891, 896 (*Lilienthal*).)

In *Lilienthal*, a defendant moved to suppress evidence at his preliminary examination that was obtained from a traffic stop following a warrantless search by the police. (*Lilienthal*, *supra*, 22 Cal.3d at p. 895.) His suppression motion was denied and he was held to answer. The defendant then pleaded guilty to one drug offense, the remaining charges were dismissed, and the court sentenced the defendant to probation after imposing and suspending execution of a prison term. The defendant appealed from his judgment of conviction and sought review on his search and seizure motion only. (*Ibid.*)

The *Lilienthal* court held that a defendant does not satisfy the requirements of section 1538.5 by moving to suppress evidence at the preliminary examination alone, because "it would be wholly inappropriate to reverse a superior court's judgment for error it did not commit and that was never called to its attention." (*Lilienthal*, *supra*, 22 Cal.3d at p 896). As later courts have explained, " '[m]agistrates presiding at preliminary hearings do not sit as judges of courts, and exercise none of the powers of

judges in court proceedings.' " (*People v. Richardson* (2007) 156 Cal.App.4th 574, 584 (*Richardson*)). Accordingly, "[o]nly if the defendant raised the search and seizure issue *in the superior court*—i.e., at some point *after* the preliminary proceedings before the magistrate—could the defendant be deemed to have raised that [search and seizure] issue . . . as required for appellate review of the issue under section 1538.5[, subd.](m)." (*Id.* at p. 584–585; see *People v. Hawkins* (2012) 211 Cal.App.4th 194, 199–200.) *Lilienthal* is on all fours. Gabler forfeited his right to appellate review of the search and seizure matter when he failed to renew it in the superior court at some point after his preliminary hearing.

This procedural failure raises the specter of ineffective assistance of counsel. However, no certificate of probable cause has been issued covering this claim and therefore Gabler cannot press it here. (See *Mendez, supra,* 19 Cal.4th at pp. 1091, 1096 [ineffective assistance of counsel claim required a certificate of probable cause as it went to the validity of the guilty plea]; *Richardson*, *supra*, 156 Cal.App.4th at pp. 595–596 [trial counsel's failure to preserve search and seizure issue for appellate review could not itself be reviewed on appeal as an ineffective assistance of counsel claim].) Accordingly, we are without authority to address defendant's ineffective assistance of counsel claim on appeal in the absence of a certificate of probable cause on this issue.[5] (*Mendez*, at p. 1098.)

As a final matter, even if we construed the present action as an appeal challenging matters that occurred *after* the plea and do not affect the validity of the plea, Gabler would not be entitled to any relief. A defendant may not complain for the first time on appeal about the manner in which the trial court exercises its sentencing discretion.

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[5] Anticipating this possibility, Gabler has filed a related petition for writ of habeas corpus contending that he was denied effective assistance of counsel. (See *In re Gabler*, A155357). While a habeas petition is his only recourse for pursuing this claim (see *Richardson*, *supra*, 156 Cal.App.4th at p. 596), by separate order we summarily deny the petition.

(*People v. Scott* (1994) 9 Cal.4th 331, 356.) Gabler did not challenge the appropriateness of his sentence in the trial court; nor could he, given his failure to comply with the terms of his presentence release and *Cruz* waiver. (Compare *People v. Masloski* (2001) 25 Cal.4th 1212, 1224 [no error where trial court "adhered to the terms of the plea agreement by sentencing defendant to a prison term that did not exceed (and in fact was less than) the maximum sentence authorized by the plea agreement in the event that defendant failed to appear on the date set for sentencing"].) Rather, on these facts, Gabler's increased sentence was an appropriate sanction. Certainly, there was no abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.)

DISPOSITION

The judgment is affirmed.

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Sanchez, J.

WE CONCUR:

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Margulies, Acting P. J.

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Banke, J.